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EDITORIAL.

ON READING AUTHORITIES IN COURT.

The important distinction ought never to be ignored by lawyers between controversies in court which must be decided instanter, and those the disposal of which is not to be immediate. In jury trials, questions of evidence or of substantive law need to be dispatched at once. Shall such a witness be allowed to testify? Shall such a piece of evidence be heard? The court cannot be adjourned nor its business arrested in order to give time to consult the authorities. The lawyer, then, should be ready to cite the appropriate text, and to read so much of it as it is necessary to read in order to convince the judge that it has been properly interpreted by him. When, at the end of the trial, the court is requested to propound certain legal principles to the jury, it may again become necessary to establish the accuracy of such principles in a similar way. In all such cases, however, excess of quotation ought to be sedulously avoided. Otherwise the attorney will awaken the suspicion that he does not remember the facts, or that he does not comprehend the principles, or that he is unable to find fit expression for them. It is of vast importance to him that he gain the reputation with the judge of using no cases that he does not fully comprehend and remember, and of always handling his authorities with scrupulous candor.

But, there are many arguments before the court which are not to be immediately followed by a determination. The court will have time to read the authorities cited. It will read them more quickly, more understandingly and with greater confidence in the correctness of the impressions it derives from them, than it could listen to them. Of what advantage then is the oral perusal of them by counsel? Many lawyers have not learned how to read; important words or phrases are slurred over, unimportant words are unduly emphasized, the enunciation is too rapid or jerky, the tones, gestures, manner of the reader divert attention from the language read. The court pays languid heed because it expects to read the case for itself. It is impatient, it is bored. It also believes that counsel are reading in default of adequate study of the case, or of competent understanding of them, or of faculty to state originally their facts or law. The lawyer that convinces the court that he appreciates its time, and confides in its thoroughly investigating at chambers or in the library, is sure to command its close and benevolent attention. The rise to address the court of an attorney who has formed the contrary reputation is often a signal for consternation and despair.

* * *

Capt. Pratt kindly furnished the students with admission tickets to the Commencement exercises of the Indian School, held during the early part of March. The exercises were exceedingly interesting. Capt. Pratt's work will live as an example of what the love for humanity can accomplish.

THE ALUMNI.

Robert A. Henderson, of Altoona, class of '94, served as a juror in the U. S. Circuit Court held at Scranton during the last week of March. Mr. Henderson is enjoying a good practice at Altoona.

* * *

Albert S. Heck, '92, located at Coudersport, is District Attorney for the county. He was recently prosecuting attorney in an important homicide case, and concerning his excellent work the *Coudersport Enterprise* said: "Mr. Heck made an able appeal for justice and the maintenance of the law. He tore in shreds the testimony of the experts who had attempted to show that she was of unsound mind and after a talk of forty-five minutes, asked the jury to weigh carefully all the evidence given and closed by saying that the blood of the innocent child was crying out for vengeance, and that he expected of them a verdict of guilty. His plea was a masterly effort and all who heard it remarked upon its brevity and conciseness."

* * *

J. S. Omwake, '96, was recently elected to the office of solicitor for the borough of Shippensburg. Mr. Omwake has been doing good legal work and is rapidly acquiring a desirable clientage.

* * *

Quinn T. Mickey, '93, is also located at Shippensburg, where he is enjoying an excellent practice. He is a frequent visitor at the county court-house.

* * *

John A. Hartman, '96, opened an office at Riverton, Cumberland county, several months ago. He speaks hopefully of the future, and having the field practically to himself, will no doubt meet with great success.

* * *

Francis J. Weakley, '95, for a short time was associated in the practice of his profession with his father in Carlisle, but since January, '96, has been practicing in Reynoldsville, Jefferson county, Pa. Although an entire stranger in that section of the State, he has more than realized his anticipations and his prospects are very bright.

Joseph C. Kissell, of the class of '94, practices in Carlisle. He occupies an office on Court House Avenue with J. Ed. Barnitz, Esq. Besides attending to his practice he does considerable work along musical lines. He is at present director of the College glee club.

* * *

Walter M. Sage, '96, is principal of the schools of Sterling, N. J. He is contemplating the taking of a post-graduate course in law.

* * *

Robert J. Campbell, '96, of Kane, Pa., spent a few days in Carlisle during the latter part of March. His many friends in the school were pleased to see him. He has had considerable legal work to do since graduation.

* * *

H. D. Carey, '96, of Jermyn, Lackawanna county, Pa., visited Carlisle for a few days during the week of the Indian school commencement in the early part of March. He gives a favorable report of himself, as well as of his classmates located in his county.

* * *

Herman Berg, Jr., '96, of Carlisle, lately moved from the Henderson Block to an elegantly fitted-up suite of offices in the Y. M. C. A. building.

* * *

Among the prominently spoken-of aspirants for the postmastership of Carlisle is John M. Rhey of the class of '96. No more capable man than Mr. Rhey could be found, and we wish him success.

* * *

C. W. Albert Rochow, of the class of '96, is a member of the school again this year, taking a post-graduate course. He is still taking an active part in athletics.

THE SCHOOL.

The Edward Thompson Company has generously donated to the Dickinson School of Law a complete set of the second edition of the American and English Encyclopedia of Law. The student body has unanimously adopted the following resolutions in regard to the gift:

WHEREAS, We, the committee, on behalf of the students of the Dickinson School of Law, realize the benefit and advantage to be derived from the possession of such a complete and exhaustive work as the 2nd edition of the American and English Encyclopedia of Law in our library; therefore be it

Resolved, That we extend to the Edward Thompson Company our sincerest thanks for the magnanimity displayed by the said company in donating the same; and be it further

Resolved, That we do all within our power to further the interests of said company by recommending the said work to the student body and the profession at large; and be it further

Resolved, That we publish these resolutions in THE FORUM of the Dickinson School of Law and spread the same upon the records of the School.

Geo. B. Somerville, Paul H. Price, H. Clay Beistel, Claude L. Roth, Harry M. Persing, Martin F. Duffy, Committee.

President Reed has agreed to deliver two lectures on "Forensic Eloquence" before the students of the Law School. The first will be given during the latter part of April and the second early in May.

The senior class has appointed a committee to look into the advisability of wearing gowns at their graduation in June. The sentiment seems to be in favor of gowns.

The four hundred mark in the enrollment of students was passed this month by Dickinson College. This is the highest number of students ever in the institution at one time. It is a compliment to the energetic work of President Reed. When he became the head of Dickinson, there were but eighty students in the college.

The Edward Thompson Company of Northport, Long Island, offer a prize of The Encyclopedia of Practice and Pleading to the member of the graduating class who stands highest in that branch assigned by the faculty as the one upon which competition will be based. The work consists of nine volumes, recently published.

Geo. B. Somerville will deliver the Commencement oration at the graduation exercises, having been selected for that purpose by Dean Trickett.

A meeting of the law students was held March 19th for a purpose of which the following challenge was the outcome:

To the President of the Belles Lettres Society:

Recognizing your society as the champion of Dickinson College in debate and in deference to a popular sentiment favoring an annual contest between the College and the School of Law, we challenge your society to a public debate under conditions that may be arranged by committees representing both organizations.

J. HARRIS WILLIAMS.
SIMON P. NORTHRUP.
G. H. MOYER.

The Belles Lettres Society met on March 31st and decided not to accept the challenge. Their answer was disappointing to the law students, who took the ground that the Belles Lettres should defend in debate the victory won in the inter-society contest. The reasons of refusal, which are not officially given, are galling also. It is to be regretted that the series could not have been arranged, for mutual benefit would have resulted to the organizations, as well as furnishing an event of interest to the students and the public.

A number of law students are candidates for positions on the college base-ball team. From present indications, the law school will have a good representation on the club this season.

THE SOCIETIES.

The most amusing moot court case of the winter was one tried before the Allison Society Wednesday evening, March 24th. It was a breach of promise suit before a jury of six. S. M. Leidich, Esq., of the Cumberland county bar, sat as judge. The evidence was of a laughable character and both the attorneys engaged for the plaintiff and the defendant conducted their cases well. Mr. Leidich gave a number of interesting points during the progress of the trial which were very much appreciated.

After a well argued case in which D. M. Graham, Esq., of the Cumberland county bar, sat as judge, the Dickinson Law Society, on Friday evening, March 27, elected the following members to office for the ensuing term: President, Joseph F. Biddle; Vice President, John E. Small; Secretary, Martin R. Herr; Treasurer, Harry M. Persing; Prothonotary, P. E. Radle; Recorder, Martin F. Duffy; Register of Wills, E. L. Ryan; District Attorney, Paul J. Schmidt; Sheriff, Frederick C. Miller; Justice of the Peace, Robert Stucker; Sergeant-at-arms, James O'Brien. Messrs. Morgan, Moser and Treibly compose the new Executive Committee.

At a meeting of the Allison Society on March 31, the following were elected as officers for the ensuing term: President, George W. Benedict, Jr.; Vice President, G. H. Moyer; Secretary, Cleon N. Berntheisel; Treasurer, Charles E. Horn; Prothonotary, J. A. Haas; District Attorney, E. S. Livingood; Sheriff, Thomas K. Leidy; Justice of the Peace, Sylvester Sadler; Auditors, H. H. Griswold, H. F. Kantner; Executive Committee, Charles E. Daniels, G. H. Moyer and E. H. Hoffman.

LECTURES BEFORE THE SOCIETEIS.

John T. Stuart, Esq., a prominent member of the Cumberland county bar for a number of years, gave a very entertaining lecture before the school on Friday evening, March 12th. Mr. Stuart took for his subject, "Amenities of the Bar." He gave in a very interesting way a number of reminiscences, each one bringing out a legal principle. At the conclusion of his address he was given a hearty vote of thanks.

Chester C. Bashore, Esq., of the class of '95, now a member of the Cumberland county bar, lectured before the joint societies on Friday evening, March 19th, on "The Powers and Duties of a Constable." Mr. Bashore spoke briefly of the origin of the word and office, setting it down as one of the most ancient offices of the realm of peace. He then unfolded the law with regard to constables making arrests with and without a warrant, the duties incumbent upon them by virtue of the office, and the treatment that is due prisoners while in the custody of constables. The lecture was practical and to the point; one of those that students cannot well afford to miss.

On Wednesday evening, March 17, J. W. Wetzel, Esq., than whom there is none better known at the Cumberland county bar, addressed the joint societies on the subject of "Judgments." Mr. Wetzel explained the different forms and the method of procedure of each. He illustrated by cases drawn from his own practice, and gave the students of the school a clear-cut talk, replete with pithy instruction. That Mr. Wetzel's address was highly appreciated was manifested by the very hearty greeting extended to him by the students.

THE MOOT COURT.

FRANK SMITH vs. R. M. DALE.

Landlord and tenant—Repairs—Landlord not liable for work done by mechanic at tenant's request.

Assumpsit for work done. Case stated.

WARREN H. SMOCK and J. HARVEY LINE for the plaintiff.

Landlord is liable for general repairs.—Scheerer v. Dickson, 3 Brewst. 276; McAlphin v. Powell, 70 N. Y. 126; Brown v. Weaver, 17 W. N. C. 230; Brolasky v. Loth, 5 Phila. 81; Long v. Fitzsimmons, 1 W. & S. 520.

Agency *quasi ex contractu* arises from absolute necessity to have repairs made.—Clark Contracts, p. 715; Kemp v. Pryor, 7 Ves. 246; Webster v. Seekamp, 4 B. & Ald. 353; Benjamin v. Dickham, 134 Mass. 418.

M. R. HERR and WALTER G. TREIBLY for defendant.

Landlord is not bound to pay for repairs ordered by tenant unless he agrees to do so, or where duty is regulated by statute. Tenant is bound for ordinary repairs. Hitner v. Ege, 23 Pa. 305; Long v. Fitzsimmons, 1 W. & S. 530; Kline v. Jacobs, 68 Pa. 57; Moore v. Weber, 71 Pa. 429; Wheeler v. Crawford, 86 Pa. 327; Reeves v. McComeskey, 168 Pa. 571.

Defendant is not liable on implied contract. Prescott v. Otterstatter, 85 Pa. 534; Myers v. Burns, 35 N. Y. 269; Clark on Contracts, p. 511.

OPINION OF THE COURT.

On December 30, 1895, George Franklin,

a tenant of a house in Carlisle, belonging to Mrs. Dale, discovered that the water pipes leading into the house had burst and that he and his family were unable to obtain water in the usual way. He immediately went to Mrs. Dale's house, in order to notify her of the breakage, but found that she had gone to Harrisburg, and that the time of her return was unknown. Franklin then called on Smith, a plumber, informing him of the state of the pipes. He named his landlady and said that she would probably pay him for the work to be done. Smith repaired the pipes and sent his bill for $9, to Mrs. Dale. The bill was reasonable in amount, but Mrs. Dale refused to pay it. Smith brings this assumpsit.

Smith's work was done without the request of Mrs. Dale. That being so, ordinarily, he could not compel her to pay for it. One man cannot benefit another, without his consent, and oblige him to pay for the benefit. There can be no recovery, therefore, unless the relation between Mrs. Dale and George Franklin conferred on the latter the authority to impose a debt on the former, in behalf of Smith.

It will not be pretended that a tenant, *qua* tenant, has authority to make any contracts whatever, for the improvement or reparation of the demised premises. Certain repairs, it is the duty of the tenant to make, *e. g.* of windows, of doors, Long v. Fitzsimmons, 1 W. & S. 530; of a fence; Mumford v. Brown, 6 Cowan, 475; Taylor, Landlord & T. § 343; 12 Am. & Eng. Encyc. 720. If he makes them, he simply discharges his duty towards the landlord. He does not impose on the landlord an obligation either to reimburse him, or to pay the person who, at the tenant's instance, has furnished the material or labor. Kline v. Jacobs, 68 Pa. 57; Hitner v. Ege, 23 Pa. 305. Other repairs the tenant is not bound to make for the benefit of the landlord, nor is the landlord bound to make them for the benefit of the tenant, in the absence of a covenant; Moore v. Weber, 71 Pa. 429; Reeves v. McComeskey, 168 Pa. 571; Wheeler v. Crawford, 86 Pa. 327; Long v. Fitzsimmons, 1 W. & S. 530; Witty v. Matthews, 52 N. Y. 512; Taylor, Landlord & T. § 327; or of a statute imposing the duty, *e. g.* of repairing the pavement, Hitner v. Ege, 23 Pa. 305. Thus, the landlord is not obliged to put on a new roof, Suydam v. Jackson, 54 N. Y. 450; or to erect a new side wall after the owner of the adjacent lot has removed it, Moore v. Weber, 71 Pa. 429; or to repair a leaking roof, Walz v. Rhodes, 1 W. N. C. 49; or to shore up the building, and drain it by a sewer, Arden v. Pullen, 10 M. & W. 321. He need not repair the water pipes so as to keep up a supply of Croton water, Coddington v. Dunham, 3 Jones & S. 412 (N. Y.); nor a pump from which the house derives its water, Pomfret v. Ricroft, 1 Saund. 321; Taylor, Landlord & T. § 328. It is impossible to harmonize with the current of decision, Scheerer v. Dickson, 7 Phila. 472, and Brolaskey v. Loth, 5 Phila. 81, in which it was held that the tenant could defend against the rent, for the landlord's failure in the former to cleanse a privy, and, in the latter, to repair a leaking roof. See Jackson, Landlord & T. 581.

But, even when the landlord is under obligation to make repairs, on account of his covenant, or otherwise, he must be notified that they are necessary, and a reasonable time must be allowed him for making them. Taylor, Landlord & T. § 330; Gerzebek v. Lord, 33 N. J. L. 240; 12 Am. & Eng. Encyc. 724.

Had the tenant Franklin, had the power to compel Mrs. Dale, his landlord, to make the repairs, or to reimburse him for his expenditures in making them, he could not impart to Smith a right of action against Dale. There are a few special cases in which one man may by a species of constructive agency, make obligations for another towards a third person; *e. g.* a consignee of goods, a common carrier, a wife or child. We have discovered no recognition of such constructive agency in a tenant with respect to the demised premises. Had, however, Franklin had the right of action, his name might have been substituted as plaintiff, to the use of Smith. The incurable vice of the action is, that there was no liability on Mrs. Dale towards anybody for the cost of the reparation of the pipes.

It was suggested, at the argument, that serious harm to the premises as well as to the furniture of Franklin, would have happened, if the water had not been turned off. The avoidance of injury to

his furniture, was motive enough to Franklin, to arrest the flow of the water. The desire to secure a continuance of the water supply was inducement enough to cause him to procure the repair of the pipes. For the cost of this benefit to himself he cannot make the landlord pay. As respects any benefit to the landlord, he, not the tenant, is to judge whether it shall be procured at his expense.

Judgment is entered for the defendant in the case stated.

HENRY D. BOLLES vs. LANARCK ROLLING MILL CO.

Preferred stock—Common stock—Dividends—Rights of holders of preferred stock—Improvement.

Bill in Equity.

HARVEY E. KNUPP and BLAKE IRVIN for complainant.

The preferred stockholders are entitled to the full 10 per cent. dividend for 1893.—Act 29th Apr., 1874, § 16, P. L. 75; Boardman v. L. S. and M. S. Ry. Co., 84 N. Y. 157; Williston v. M. S. and N. J. R. R. Co., 95 Mass. 400; W. C. and P. R. R. v. Jackson, 77 Pa. 321; McLean v. Plate Glass Co., 159 Pa. 112; Elkins v. C. and A. R. R. Co., 36 N. J. Eq. 233; Park v. Grant Locomotive Works, 40 N. J. Eq. 114; Bailey v. Railroad Co., 84 U. S. 96; N. Y. etc., R. R. Co. v. Nichols, 119 U. S. 307; Taylor, Corporations § 563; Warren v. King, 108 U. S. 389; Am. and Eng. Ency. of Law, Vol. 23, p. 603.

A dividend of 10 per cent. on the preferred stock should be declared for 1894.—Thompson v. Erie R. R., 89 Mass. 512; Belfast R. R. v. City of Belfast, 77 Me. 445; Richardson v. Vermont R. R., 44 Vt. 613; Rts., Rem., and Pr., 665. The contract by which the directors are bound makes no provisions for improvements, and if such are made, the cost cannot be subtracted from the amount that should be divided among the preferred stockholders.—Brann's Appeal, 105 Pa. 414; Bailey v. R. R. Co., 84 U. S. 96; Clearwater v. Meredith, 68 U. S. 25. The directors did not act in good faith.—W. C. and P. R. R. v. Jackson, *supra*.

GEO. W. BENEDICT, JR., and J. P. COSTELLO for defendant.

Directors have the discretionary power, as to whether the profits will justify a declaration of a dividend.—McLean v. Plate Glass Co., 159 Pa. 112; Culver v. Reno Real Estate Co., 91 Pa. 367; McGregor v. Home Ins. Co., 33 N. J. Eq. 181; Elkins v. C. and A. R. R. Co., 36 N. J. Eq. 233; P. & C. R. R. Co., v. Allegheny, 63 Pa. 126; N. Y. R. R. Co. v. Nichols, 119 U. S. 296; Warren v. King, 108 U. S. 398; Park v. Grant Locomotive Works, 40 N. J. Eq. 117.

At this late date and after the dividend has been paid out to the holders of common stock, the preferred stockholders cannot ask for 3 per cent. more dividend for 1893.—Elkins v. Camden, etc., R. R. Co., N. J. Eq. 233. 36

OPINION OF THE COURT.

The Lanarck Rolling Mill Co., was incorporated under the act of April 29, 1874, 1 P. & L. 934 *et. seq.* Common and preferred stock was issued, the certificates of the latter declaring the holders entitled to dividends of 10 per cent. from the net earnings of each year, when declared by the directors, before the payment of any dividend on the common stock. In the year 1894, the directors declined to declare any dividend on any stock because the liabilities of the company were very large on account in part of extraordinary expense incurred for improved machinery. In 1893 a dividend of 7 per cent. on the preferred stock, and of 2 per cent. on the common, had been declared. This bill filed by a preferred stockholder, prays for a decree that the directors declare and pay a dividend of 10 per cent. on the preferred stock and an additional dividend of 3 per cent. to make up the deficit of 1893. The net profits of 1894, not deducting therefrom the extraordinary expenditures, are enough to pay the dividends sought. These expenditures have correspondingly increased the value of the assets. The sum distributed as a two per cent. dividend in 1893, among the holders of common stock, would have been more than sufficient to pay 3 per cent. on the preferred stock. The answer of the defendant alleges that the directors had for the reasons stated *supra*, deemed it inexpedient to declare any dividends.

The preferred shareholder is entitled to receive 10 per cent. from the net earnings of each year; and only out of the net earnings. 2 Thomp. Corporations § 2236. But, the right to a dividend, even out of the net earnings, is not absolute. The directors may exercise a judgment as to the propriety of declaring such a dividend, and, although their discretion is not absolute and irreviewable, by the courts, they will not overide it, unless it clearly ap-

pears that they have not acted properly, in view of the claims both of the shareholders, the creditors, and the public served by the corporation. McLean v. Plate Glass Co., 159 Pa. 112; New York, etc., R. R. v. Nichols, 119 U. S. 296. The declaration of a dividend is the expression of the judgment of the directors, that a fund is available for distribution among the stockholders, but in a proper case, they may be restrained by a court of equity, from actually paying out the money; *i. e.* their decision of the propriety of the dividend may be reversed. Davison v. Gillies, 16 Chanc. Div. 347.

The directors of the Lanarck Rolling Mill Company divided in 1893, among the holders of preferred and common stock, enough money to pay 10 per cent. to the holders of the preferred. To these, however, only 7 per cent. was allotted. This was a clear breach of duty on the part of the directors. What remedy have the injured stockholders? They cannot sue the common shareholders thus over-paid. Whether the directors are personally liable to the preferred stockholders, or whether the corporation could recover back the money improperly paid them, it is unnecessary to decide. Dent v. London Tramways Co., 16 Chanc. Div. 344. We think it quite clear that the company both can and must withhold from them, when a future dividend is declared, a sum sufficient to indemnify the preferred stockholders, for while these can receive dividends each year, only out of the profits of that year, the corporation has paid a portion of the profits of 1893, belonging to them, to the common stockholders.

But, the particular redress sought by this bill, is neither the repayment of money improperly received by the common stockholders, nor the subtraction from a dividend for 1894, made to them of enough to replace this money. It is rather a command to the directors that they shall make a dividend, which, in their judgment it would be injudicious to make, sufficient to pay 10 per cent. for the current year, to the preferred stockholders, and 3 per cent. for the preceding year.

It appears, by the bill and answer, that the net profits of 1894 are enough to pay 13 per cent. on the preferred shares. By net profits, we understand so much of the income of the mill for the year 1894, as is left after paying the expenses (other than those for new machinery) and after diverting enough to restore the capital to the position it was in at the beginning of the year; Dent v. London Tramways Co., 16 Chan. Div. 344; 2 Thompson, Corp. § 2268; or "what is left after paying current expenses and interest on debt and everything else which the stockholders, preferred and common as a body corporate, are liable to pay." Warren v. King, 108 U. S. 389.

After a declaration of what was equivalent at least to 10 per cent. on the preferred stock, last year, and an improper diversion of a three-tenths of this sum to the common shareholders, we find it impossible to place implicit reliance on the good faith, and prudence of the directors. The machinery in the mill earned this dividend. The improved machinery, if it is to increase the mill's efficiency, is to be especially beneficial to the common stockholders by earning for them dividends that would not have been otherwise earned. We think it is but equitable that so much as equals that portion of the dividend of 1893 that was improperly awarded to the common shareholders, should be now awarded to the preferred shareholders. *Cf.* Dent v. London Tramways Co., 16 Chanc. Div. 344. Let a decree to this effect be drawn up.

A. W. LEONARD vs. J. C. PIERCE.

Wages—Set-off—Section 1, Act 20 May, 1891, interpreted.

Rule for set-off.

W. L. SNYDER and EDWIN G. HUTCHINSON for plaintiff.

(1) The Act 20 May, 1891, is unconstitutional.

(a) Impairs obligation of contracts.—Art 1, Sec. 17, Constitution of Penna.

(b) Violation of indefeasible right to acquire, possess and protect property and the pursuit of happiness.—Art. 1, Sec. 1, Constitution of Penna.—Commonwealth v. Isenberg, 4 Pa. D. R. 579; Commonwealth v. March, 14 C. C. 369; Waters v. Wolf, 162 Pa. 171.

(c) It is a local or special law relating to mining.—Art. 3, Sec. 7, Constitution of Penna.

(d) It impairs the rights of persons *sui juris* to make contracts.—Godcharles v. Wigeman, 113 Pa. 431; Waters v. Wolf, *supra.*

(2) Plaintiff cannot be deprived of his right to set-off except by his express consent.—Lloyd's Appeal, 95 Pa. 518.

(3) Judgment containing waiver of exemption law may be set off against judgment not containing such a waiver.—Riehl v. Vockroth, 10 C. C. 657; Shoemaker v. Flosser, 8 C. C. 479.

HARRY M. PERSING and PAUL J. SCHMIDT for the defendant.

(1) Allowance of set-off would be a violation of the Act of May 20, 1891, § 1.

(2) An ordinary judgment cannot be set off against a judgment for wages.—Boscher v. Maurer, 5 Pa. C. C. 215; Frutchey v. Lutz, 167 Pa. 237.

(3) Allowing such set-off would be practically an evasion of § 5, Act 15 Apr., 1845, 1 P. & L. Dig. 1946; Catlin v. Ensign, 29 Pa. 264.

(4) Agreement by laborer to waive proviso exempting wages from attachment is void.—Firmstone v. Mack, 49 Pa. 387; Still v. McKerrihan, 172 Pa. 280.

(5) Defendant was engaged in mining business and therefore within the Act of May 20, 1891.—Stoughton's Appeal, 88 Pa. 198; Funk v. Haldeman, 53 Pa. 229.

ONINION OF THE COURT.

During Dec. 1895 and Jan. 1896, J. C. Pierce was employed by Leonard about an oil well, and on Jan. 20th he sued A. W. Leonard for his wages before a justice of the peace, recovering a judgment of $70. On appeal, judgment was affirmed by default May 4, 1896. On Dec. 1, 1895, J. C. Pierce had given to R. A. Prindle a judgment note with a waiver of exemption. The note was assigned by Prindle to A. W. Leonard on Feb 1, 1896. On 16th March, 1896, Leonard entered a judgment thereon for $96. Leonard obtains a rule on Pierce to show cause why his judgment should not be set off against that of Pierce.

To this set-off it is objected (1) that it would contravene the 1st section of the Act of May 20, 1891; 2 P. & L. 4801, which requires *inter alia* that "laborers * * at manual * * * work in the business of mining" shall receive payment of their wages "in lawful money of the United States." This act is, in some respects but not in this, a modification of the act of May 23, 1887, and in a well considered opinion, Pershing, J., held in Bosche v. Maurer, 5 Pa. C. C. 215, that under the act of 1887, the employer could not set off against the employee's judgment for wages, a judgment held by him against the employee founded on a book account. No question was made concerning the constitutionality of the act of 1887.

Pierce's endeavor to prevent the set-off, by reason of the act of 1891, is resisted by the denial of the constitutionality of that act. Its constitutionality is assailed because (a) it impairs the obligation of contracts; Art. 1, sec. 17, Constitution of Pennsylvania; (b) it violates the indefeasible right to acquire, possess, and protect property and to pursue happiness; Art. 1 sec. 1 Constitution; (c) it is a local or special law regulating mining; Art. 3 sec. 7, Constitution; (d) it impairs the right of persons *sui juris* to make contracts.

For the first two of these reasons, the act of 1891 has been adjudged unconstitutional in Commonwealth v. Isenberg, 4 D. R. 579. The court refrained from determining whether it is constitutional or not in Com. v. Marsh, 14 Pa. C. C. 369, the statute, even if valid, not applying to the facts. We cannot think the statute void for either of the first two reasons assigned. To prohibit the making of a contract is not to impair the obligation of a contract. This is so manifest that we deem discussion of it unnecessary. To regulate, restrain, and prohibit acts of various sorts is so much the function of government that we find it difficult to accept the suggestion that the restriction imposed by the act of 1891 invades indefeasible rights to property, person, or happiness.

The act is a law regulating mining. As such it is invoked by Pierce. He assumes therefore that the business in which he was employed is in the sense of the act of 1891 mining. In this he is correct; Stoughton's Appeal, 88 Pa. 198; Funk v. Haldeman, 53 Pa. 229. The act is not a local law regulating mining. Is it a special law? A law making "mining" a distinct class of operations and regulating it as such class, is tacitly allowed by the constitution. It is only a *special* law regulating this *class* that is prohibited. It is special only as it attempts to deal with the payment of labor. But in this respect it is no more special than such legislation requiring mine inspectors, bosses, etc., etc., whose constitutionality is beyond debate. To deny that labor is a legitimate subject for legislation, as a class, would erase from the statute books many laws that are frequently invoked, and whose validity is not impugned. As "min-

ing" may be the subject of law and "labor" another subject of law, we are not able to conclude that "labor in the business of mining" may not be a proper subject of law.

Is the fourth alleged cause of unconstitutionality decisive? After much demur, we feel constrained to say that, as to some applications of the act, it is. The act of 29 June, 1881, P. L. 147, ordaining that persons engaged in certain business should pay their employees "in lawful money of the United States or by the cash order," was adjudged unconstitutional in Godcharles v. Wigeman, 113 Pa. 431, as an attempt "to do what, in this country, cannot be done, that is, prevent persons who are *sui juris* from making their own contracts." This decision, though sharply criticised by a writer in the Am. Law Review of 1894, and declared to rest on "very flimsy grounds" by the annotator of P. & L. Dig. 4802, has been endorsed in Waters v. Wolf, 162 Pa. 153. In so far therefore as the act of 1891 prohibits contracts to pay employees in something other than money, we should feel compelled to declare it unconstitutional. But, it would not follow that it would be void, as respects cases in which there is no contract concerning the substance in which payment of wages is to be made. There is no such contract in this case. We cannot satisfy ourselves that the legislature is unable to require, when a contract of employment without specification of mode of compensation is made, that it shall be discharged by the actual payment of the money and not by a set-off of a counter-demand. The right to set-off is the creature of the law, and can be withdrawn by the same power that conferred it.—Bosche v. Maurer, 5 Pa. C. C. 215.

Another objection to the set-off is that it would defeat the policy of the law in regard to the attachment by creditors of employees, of their wages. The fifth section of the act of 15th April, 1845, 1 P. & L. 1946 declares that "the wages of any laborers * * * shall not be liable to attachment in the hands of the employer." Leonard under this act would have been prohibited after getting a judgment against Pierce, from issuing an attachment execution thereon, and attaching the wages in his own hands due to Pierce. But if he is permitted to set off the judgment for wages, he procures the application of the wages to his debt in a similar way. The policy of the act of 1845 is plainly to prevent the interception of the wages before they reach the employee, by any creditor.

Another objection to the set-off is, that the judgment of Leonard against Pierce contains a waiver of the exemption, while that of Pierce against Leonard does not. This objection overlooks the 1st section of the act of March 4, 1887, 1 P. & L. 1927, ordaining that "no exemption of property from attachment, levy or sale, upon execution, shall be allowed upon judgment for $100 or less obtained for wages for manual labor." Both judgment debtors are equally destitute of the right to the exemption. But we cannot see how the absence of a right in Pierce to deny the exemption to Leonard could deprive Leonard of the right of set-off of his judgment against Pierce's. That set-off would be a means of collecting the Pierce debt. If, the law permitting attachment, he had levied on the debt by attachment, Pierce could not have claimed an exemption. How then is he hurt when set-off instead of attachment is the process adopted by Leonard for compelling the payment of the debt? In Shoemaker v. Flosser, 8 Pa. C. C. 479, Rice J., and in Bosche v. Maurer, 5 Pa. C. C. 15, Pershing J. held that A could not set off a judgment against B against B's judgment against A when A had no right to the exemption, as respects his debt to B, and B had no such right as respects his debt to A; though this was denied in Riehl v. Vockroth, 10 Pa. C. C. 657 by Archibald J. But how one who had waived his exemption could object to the set-off of a judgment against his, because the owner of that judgment had not waived the exemption, is difficult to conceive.

It is objected that there can be no set-off because it appears that when Pierce recovered his judgment against Leonard before the justice, Leonard did not possess the judgment or the note on which it was entered. It is undoubtedly the rule that a defendant can set off no claim, even a judgment, that he did not own when the action was begun.—Huling v. Hugg, 1 W. & S. 418. This principle does not apply, however, to the set-off of judgment against judgment. Either judgment creditor, without regard to the relative age of the

judgments or of the debts on which they are founded, may obtain the rule for the set-off.—*Vide* Melloy v. Burtis, 4 Pa. C. C. 613, note.

As, for the reasons considered, Leonard is not entitled to the set-off of his judgment against Pierce's, but must pay Pierce in cash, the rule for set-off is discharged.

H. L. FREAS vs. E. J. EHRGOOD.

Rent—Distress—Defalcation act—Set off—Double costs.

Replevin.

GEO. B. SOMERVILLE and ALFRED JOEL FEIGHT for plaintiff.

A party cannot be deprived of his right of set-off except by his express consent.—Lloyd's Appeal, 95 Pa. 518; Reed v. Penrose, 36 Pa. 234. All taxes, etc., are debts in the same right and can be set-off.—Stuart v. Com., 8 Watts 74; Trunick v. Gilchrist, 81 Pa. 160; Jarecki v. Haymaker, 138 Pa. 541.

The orders drawn on Freas were based on a sufficient consideration and cannot be revoked. Credit must be given for all the orders.—Barse v. Morton, 43 Hun. (N. Y.) 479; Foster v. Dayton, 10 Daly, (N. Y.) 225.

If anything, only $35 is due. Being less than a month's rent, distress will not lie.

JOSEPH F. BIDDLE and GEO. T. BROWN for defendant.

There can be no set-off in replevin. The defalcation act does not extend beyond the limits of set-off. The tenant cannot reduce the amount of his rent, except upon a failure of consideration.—Beyer v. Fenstemacher, 2 Wh. 95; Sterner v. Abbot, 13 W. N. C. 209; Anderson v. Reynolds, 14 S. & R. 439; Philips v. Monges, 4 Wh. 225; Paterson v. Haight, 3 Wh. 150; Fairman v. Fluck, 5 Watts 516; Spencer v. Clinefelter, 101 Pa. 219; Mackey v. Dillinger, 73 Pa. 85.

If judgment is rendered in favor of the defendant, he is entitled to interest from the time of distress, Beyer v. Fenstemaker, *supra*, and judgment for double costs.—Act 21st Mch., 1772, P. & L. 4106; Prescott v. Otterstatter, 85 Pa. 534; Park v. Holmes, 22 W. N. C. 288.

OPINION OF COURT.

Ehrgood leased to Freas a grist-mill for three years at the rental of $41.66 per month. On January 12, 1897, rent for six months, $249.96, was in arrear and unpaid. Freas had certain claims against Ehrgood. He had paid taxes for Ehrgood, he had a judgment note against Ehrgood, and had let others have grain and flour on orders drawn by Ehrgood. On these accounts he alleged that Ehrgood owed him $259, or $9.04 more than the rent. Ehrgood conceded his indebtedness for the taxes, and for the judgment note, and for some of the orders, to the extent of $214.96. For this amount he allowed a credit to Freas, and claimed as the balance of rent, $35. He denied any larger indebtedness. On the 12th January, 1897, he distrained on the goods of Freas on the demised premises sufficient to produce $100. Thereupon Freas instituted this replevin, and having given a replevin bond the sheriff delivered the goods distrained upon to him. Ehrgood avowed for rent in arrear.

$249.96 of rent was due, on January 12, 1897. Ehrgood, as landlord, had therefore, on that date, a right to distrain for it, unless something special existed to deprive him of such right. The only fact, whose having the effect to deprive him of the right to distrain is suggested, is the existence of counter-claims of the tenant. Some of these claims were conceded by Ehrgood to be valid, and he has deducted them from the rent. Was he bound to deduct the rest?

That he has voluntarily allowed some of these claims, does not preclude him from disallowing the residue. One who concedes that he owes a certain debt, is not thereby estopped from disputing the existence of another debt to the same person. And it cannot matter that the alleged creditor is his tenant; or that the proceeding in respect to which the admission of one debt, and the denial of another, occurs, in a proceeding, distress or otherwise, for the recovery of the rent. Unless Freas had a right to the defalcation, independently of Ehrgood's allowance of it, he did not acquire such right by such allowance. It surely cannot be maintained, that if B, a debtor to A, alleges that he has four claims against A, A is estopped from disputing the fourth claim, because he has conceded the correctness of the other three. Nor could it be successfully asserted, that the waiver of a right to resist the defalcation of three claims, compelled the waiver of the right to resist the defalcation of the fourth.

There was a right, doubtless, to defal-

cate the taxes if they were taxes assessed on the mill. This right is expressly conferred by the 6th section of the act of April 3, 1804; 1 P. & L. 2636. The rent may be reduced, also, for defaults of the landlord in respect to the lease, *e. g.* by eviction; by the landlord's failure to make covenanted repairs; by a breach of warranty that the premises are, or shall remain in a certain condition; or by a failure to compensate the tenant, as the landlord has covenanted to do, for improvements. Fairman v. Fluck, 5 W. 516; Warren v. Caulk, 3 Wh. 192; Phillips v. Monges, 4 Wh. 226. In no other cases is set-off allowed, in the distress, or in the replevin instituted by the tenant to annul the distress. 5 W. 516; 3 Wh. 192; 4 Wh. 226, *supra;* Peterson v. Haight, 3 Wh. 150; Beyer v. Fenstermacher, 2 Wh. 95; Anderson v. Reynolds, 14 S. & R. 439; Sterner v. Abbott, 13 W. N. C. 209; Spencer v. Clinefelter, 101 Pa. 219.

The 20th section of the act of March 20, 1810, 1 P. & L. 2549, provides for a defalcation against a landlord's rent, by a proceeding before a justice of the peace. Had such proceedings been resorted to and a defalcation adjudged, we are not now required to say whether in the replevin it would be allowed.

The landlord has been by the replevin retarded in his collection of his rent. He is entitled to interest thereon, from January 12, 1897, the time when it had become due. Phillips v. Monges, 4 Wh. 225; Obermyer v. Nichols, 6 Binn. 159; Nichols v. Jones, 166 Pa. 599; Naglee v. Ingersoll, 7 Pa. 185.

The 10th section of the act of March 21, 1772, 2 P. & L. 4106, after authorizing the landlord, in a replevin by the tenant, to avow, provides that "if the plaintiff or plaintiffs in such action shall because nonsuited, discontinue his, her, or their action, or have judgment given against him, her, or them, the defendant or defendants in such replevin shall recover double costs of suit." The defendant, Ehrgood, being entitled to a judgment for the full amount of the claim in the avowry, Prescott v. Otterstatter, 85 Pa. 534, must also recover double costs.

Judgment for the defendant for $35 with interest from January 12, 1897, for the costs of the distress, for double costs in this action and for a return of the goods replevied will be entered.

JOSEPH WATSON, JR. vs. JOHN JONES.

Executor's liability—Appointment of attorney in fact revocable on death of principal.

Case stated.

CHARLES S. SHALTERS for the plaintiff.

Legatee's death revoked agency.—1 Am. & Eng. Ency. Law, 1222 (2nd Ed.); Marlett v. Jackson, 3 Allen 287; Lincoln v. Emerson, 108 Mass. 87; Cassiday v. McKenzie, 4 W. & S. 283.

Executor knew of revocation of agency, and is therefore liable to plaintiff.—Michigan Ins. Co., v. Leavenworth, 30 Vt. 11; Long v. Thayer, 150 U. S. 520; Galt. v. Galleway, 4 Pet. 332; Cassiday v. McKenzie, *supra.*

A. M. DEWALL for the defendant.

Executor is not chargeable with misconduct, embezzlement or insolvency of his attorney.—Bacon v. Bacon, 5 Ves. 334; Jones v. Kline, 3 Johns, 578; Calhoun's Estate, 6 Watts 185; Gratz v. Phillips, 1 P. & W. 343.

OPINION OF THE COURT.

John Watson died, leaving Joseph Watson and Amos Watson, his next of kin, who resided in Leeds, England. He left a legacy of $2,500 to Joseph and Amos, and also certain lands in Huntingdon County, Pa. His will constituted John Jones his executor, and nominated James Smith to be Jones' attorney. Joseph constituted Smith his attorney to receive from Jones his legacy. On January 1, 1885, Jones paid to Smith on account of Joseph's legacy, $500, as attorney in fact of Joseph. In November, 1885, Joseph Watson died, but on January 1, 1886, Jones, although he had knowledge of the death of Joseph Watson, paid the balance of the legacy, viz: $1,200 to Smith. Joseph Watson Jr., the administrator of Joseph Watson, having failed to receive the $1,200 from Smith, who has become insolvent, amicably sues the executor, the facts *supra* being incorporated into a case stated.

The only justification for paying the $1,200 to Smith, was the fact that he had been appointed agent to receive it by Joseph Watson. Without such appointment, the payment to Smith could have

had no more power to discharge the duty of Jones, than a payment to X, or Y, or Z. But the past appointment of an agent, can legitimate a present transaction with him as such, only on the hypothesis that the agency continues down to the date of the transaction, or that, despite its termination, the party dealing with the agent believes and has a right to believe that the agency continues.

The agency of Smith did not, in fact, continue down to the time of Jones' payment to him, for Joseph Watson had then been a month dead. No principle is better established than that the death of the principal revokes the powers of the agent. Marlett v. Jackman, 3 Allen, 287; Lincoln v. Emerson, 108 Mass. 87; Cassiday v. McKenzie, 4 W. & S. 282; 1 Am. & Eng. Encyc. Law, 1222 (2nd Ed.)

When an agency has once existed, and has ceased by revocation, it might be a question whether persons who have been aware of the agency, but have not learned of its cessation, could continue safely to deal with the agent. The weight of authority is, that when the authority of the agent is recalled by the death of the principal, all persons, even if ignorant of the revocation, deal with the former agent at their peril. Marlett v. Jackman, 3 Allen, 287; 1 Am. &. Eng. Encyc. Law, 1225; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11; Galt v. Galleway, 4 Pet. 332; Long v. Thayer, 150 U. S. 520. In the last case it is held that payments made by A's debtor to B, A's agent, in ignorance of the death of A, will not discharge the debtor. Against very many decisions to this effect, stands almost, if not quite solitary, the Pennsylvania case of Cassiday v. McKenzie, 4 W. & S. 283, in which it is held that payments made by a debtor to an agent of the creditor, in ignorance of the death of the creditor, will be a good payment.

It is unnecessary, however, to make a choice between the isolated decision of Cassiday v. McKenzie and the many authorities which it antagonizes, for in the case stated it is distinctly confessed that Jones had knowledge of the death of Joseph Watson when he paid the legacy to Smith. Bound to know the law, he therefore knew that Smith had no authority to receive the payment. Had Smith in fact paid the money over to Joseph Watson, Jr., the absence of authority in him to receive it would of course have been immaterial. But Smith has never paid it. He is insolvent. Only one conclusion can result. The payment did not discharge Jones.

Smith had so far the confidence of John Watson, that he designated him to be the legal adviser and attorney of his executor, Jones. He did not by so doing appoint Smith attorney in fact to receive payment of the legacies. For any losses arising from the employment of Smith as attorney, the testamentary nomination might have shielded Jones from liability. But Smith's relation to Jones as attorney could in no way warrant the payment of legacies to him as the medium of their transmission to the legatees.

As then Jones has not paid the $1,200 to Joseph Watson, or to his executor; as the payment of $1,200 to Smith is, as respects Watson's right, a nullity, judgment is entered on the case stated for the plaintiff and against the defendant for the sum of $1,200 with interest from January 1, 1886.

ISAIAH REMINGTON vs. ISAAC FORD.

Orphans' Court—Sale of Real Estate of Decedent—Confirmation of Sale—Collateral Attack.

Ejectment.

PAUL H. PRICE and SIMON P. NORTHRUP for plaintiff.

The Orphans' Court may confirm a sale, made without a previous order, with the same effect, as if such order had preceded such sale.—Act 13th Apr., 1854, § 3, 2 Purd. 1834; Klingensmith v. Bean, 2 W. 486; Sankey's Appeal, 55 Pa. 491; Potts v. Wright, 82 Pa. 498; Est. of James Bowker, 12 Phila. 161; Est. of Mary Charlton, 12 Phila. 102; Mussleman's Appeal, 65 Pa. 480.

The proceedings and decrees of the Orphans' Court cannot be questioned in a collateral suit, unless for fraud or want of jurisdiction.—Act 29th Mch., 1832, § 2, 2 Purd. 1626; Garber v. Com., 7 Pa. 265; Lockhart v. John, 7 Pa. 137; Rhoads' Appeal, 39 Pa. 186; Klingensmith v. Bean, *supra*; Bell's Appeal, 71 Pa. 471; Phelps v. Benson, 161 Pa. 419.

HARVEY S. KISER and CHAS. W. HAMILTON for defendant.

Decrees of the Orphans' Court may be avoided collaterally, if such court did not

have jurisdiction over the subject matter.—Act of 29th Mar., 1832, § 2, P. & L. 3273; Gilmore v. Rodgers, 41 Pa. 120; McKee v. McKee, 14 Pa. 231; Torrence v. Torrence, 53 Pa. 505; Snyder v. Snyder, 6 Binn. 482; Sager v. Mead, 164 Pa. 125; Jacoby v. McMahon; 174 Pa. 183.

The Orphans' Court did not have jurisdiction and therefore the confirmation is of non-effect.—Walker's Appeal, 1 Gr. 434; Stiver's Appeal, 56 Pa. 9; Pry's Appeal, 8 W. 253; Benner v. Phillips, 9 W. & S. 13; Jacoby v. McMahon, *supra*.

It is the duty of the purchaser to see that the proceedings have been so far regular as to authorize the sale.—Snyder v. Snyder, *supra*; Messinger v. Kintner, 4 Binn. 103.

OPINION OF COURT.

Samuel Ford died, owning five farms. His debts amounted to $42,000. His personal assets produced at the administrator's sale, only $1,900. The administrator applied to the Orphans' Court for authority to sell four of the farms, for the payment of debts. The court gave the order desired. The administrator sold the four farms, leave to sell which had been solicited, in his petition. They brought respectfully, $11,423, $3,296, $17,420, and $11,000; in all $43,139, which, with the $1,900 of personalty was $647.19 in excess of all the debts and of the expense of administration. Besides selling these four, the administrator sold farm No. 5 for $3,750. He made return to the Orphans' Court of the sales of the five farms, and of their prices, and they were confirmed. Isaiah Remington became the purchaser of No. 5 and to him a deed was made. Isaac Ford, the only child of Samuel Ford refusing to give up the possession, this ejectment is brought.

Ford's refusal to surrender the possession is grounded on the assumed invalidity of the sale. If by it, his right was divested and transferred to the purchaser, he must yield the possession to the purchaser; otherwise not. The administrator had no power to sell, except what he got from the law, and the decree of the Orphans' Court.

When the personal estate is insufficient to pay the decedent's debts and the expenses of administration, on the application of the administrator setting forth the fact, the Orphans' Court may authorize a sale of real estate. Sec. 31, Act March 29, 1832; 1 Purd. 598; Sect. 20, Act Feb., 24, 1834, 1 Purd. 598. The authority of the court does not seem to depend on the *fact* that there are debts which the personalty is insufficient to pay, Torrance v. Torrance, 53 Pa. 505; Gallaher v. Collins, 7 W. 552, if the petition to the court avers the existence of such debts. We think it indisputable that an oral application by the administrator will not support a decree of sale, and that the written application must not only name the decedent, and aver the existence of land, but must further aver that the personal assets have been or will be insufficient to discharge all the debts. Sec. 57, Act March 29, 1832, 2 P. & L. 3340; Torrance v. Torrance 53 Pa. 505. On a petition averring an unpaid legacy, but not an unpaid debt, a sale will be void. Torrance v. Torrance, 53 Pa. 505. Samuel Ford's administrator made written application to the Orphans' Court for leave to sell his land. He therein stated that the debts amounted to $42,000, and that the personal assets had produced at the sale but $1,900. He further described the five tracts of the deceased, and requested authority to sell the first four.

He subsequently returned the sale of the tracts, leave to sell which he had thus obtained, to the court, praying a confirmation thereof. The court confirmed it. It is not disputed, nor could it be, that by this confirmation, the ownership of the heir of the decedent was carried over from him to the purchaser.

But, in his return of the order to sell the four tracts, the administrator reported to the court that he had also sold tract No. 5, and the confirmation was as much of the sale of No. 5, as of that of the other four tracts. Was the ownership of No. 5 also carried out of Isaac Ford, the heir, to Isaiah Remington, the vendee?

That the sale of No. 5 was not asked for and authorized previously to the confirmation, does not invalidate it. Of a sale which the Orphans' Court could have authorized, its subsequent ratification will be equivalent to the previous authorization. Mussleman's Appeal, 65 Pa. 480; Bell's Appeal, 71 Pa. 465. "In all cases wherein any of the courts of this Commonwealth might have authorized any sale * * * and such sale * * * may have been made without the leave of such court,

it shall be lawful for such court, if approving of such sale * * *, to approve, ratify and confirm the same, with the same effect as if such decree had preceded such sale * * *." 2 Purd. 1834; 2 P. & L. 4058.

But, whatever facts must appear to the court in order to validate its order to sell, and its subsequent confirmation of the sale, must appear to it in order to validate a confirmation of a sale not previously directed. An oral statement by an administrator that he had, because he thought it wise, sold the decedent's land, would not support a confirmation. There must be a written report of the fact of sale; there must be a written statement to the court of the same facts whose averment would have been necessary to found an order to sell. It does not distinctly appear what was stated by the administrator in the return of the sale. We must assume that he stated the facts. He then averred that the debts had been $42,000; that the personal fund was $1,900; that, on the order already obtained, he had sold four tracts, and that the proceeds of their sale was $43,139. In short, he must have made it plain to the court that he was in possession of $3,039 more than was required to pay the debts. Such being the facts thus apparent to the court, it had no authority either to order the sale of the 5th tract, Benner v. Phillips, 9 W. & S. 13; Pry's Appeal, 8 W. 253, or to ratify a reported sale of it, made without prior order. Jacoby v. McMahon, 174 Pa. 133.

But, it is suggested that there were expenses of administration and, that, so far as the court could see, they would be more than enough to consume the $3,039, and would therefore require the sale of the 5th tract. Neither the existence of debts nor of the expenses of administration, empowers the Orphans' Court to order a sale of the decedent's land. It must be made to appear to the court that there is an *excess* of such debts or expenses beyond the assets already in the control of the administrator, &c. But these assets, at the time when the Orphans' Court confirmed the sale of No. 5, were $647.19 greater than all the debts and what has since been found to be the expenses of administration. We think the rule a sound one to refuse to authorize a sale, merely for the expenses of administration until the filing of a final account, showing a balance payable to the administrator. Grice's Estate, 2 W. N. C. 211; Kautz's Estate, 11 Pa. C. C. 322. [The account had been adjudicated in Cobaugh's Appeal, 24 Pa. 143.] Such settlement of the account ought to be deemed by the court the only authentic evidence that a balance exists for covering which a sale of the land is necessary. If the administrator reported the facts to the court, there was nothing in them to legitimate the confirmation of the sale of the 5th tract.

We have not lost sight of the distinction between irregularities on the part of the Orphans' Court, sufficiently serious to lead to a correction of its decree, either by itself on review, or by the Supreme Court on appeal, *e. g.* Pry's Appeal, 8 W. 253; Cobaugh's Appeal, 24 Pa. 143; but not collaterally, McPherson v. Cauliff, 11 S. & R. 422; Potts v. Wright, 82 Pa. 498; Sager v. Mead, 164 Pa. 125; Klingensmith v. Bean, 2 W. 486; and irregularities so grave as to invalidate the decree and what was done in conformity with it, for all purposes, Jacoby v. Mahon, 174 Pa. 133. The 2nd section of the Act of 29th March, 1832, declares that decrees of the Orphans' Court "in all matters within its jurisdiction, shall not be avoided collaterally in any other court." Gilmore v. Rogers, 41 Pa. 120; Torrance v. Torrance, 53 Pa. 505. We regard, among the jurisdictional facts without which the confirmation of a sale of land by the Orphans' Court is absolutely void, (in the absence of an estopping circumstance, Jacoby v. Mahon, *supra*,) (a) a written petition; (b) by the administrator, (c) which shall aver the excess of debts, or of ascertained administration expenses, beyond the assets at his disposal, and (d) the decedent's seisin of real property. One of these jurisdictional facts, (c) could not be, and therefore was not, averred by the administrator to the court, on his application for the confirmation of the sale of No. 5. We hence think that confirmation void, the sale invalid, and the title of Isaac Ford unaffected by it. Judgment must therefore be entered for the defendant.

N. B.—*Cf.* Smith v. Wildman, 178 Pa. 245.

CHARLES PETTIS vs. JEDEDIAH WRIGHT.

Employer and employe—Breach of contract—Measure of damages—Reasonable effort to secure employment.

Action in assumpsit.

ADAIR HERMAN and H. H. HESS for plaintiff.

Where one contracts to employ another for a certain time at a specified compensation, and discharges him without cause before the expiration of the time, he is, in general, bound to pay the full amount of wages for the whole term.—Costigan v. R. R. Co., 2 Denio (N. Y.) 609; Howard v. Daly, 61 N. Y. 362; 2 Story, Contracts, § 962 h; Stewart v. Walker, 14 Pa. 293; Matthews v. Park Bros., 146 Pa. 384; Liphart v. Woods, 1 W. & S. 265.

A discharged servant is not bound to seek work in another neighborhood.—14 Am. & Eng. Ency. of Law, 796, Costigan v. R. R. Co., *supra;* Gillis v. Space, 63 Barb. (N. Y.) 177. Nor to engage in work of a more menial nature.—Gillis v. Space, *supra;* Costigan v. R. R. Co., *supra;* Wolfe v. Studebaker, 65 Pa. 459; 2 Story, Contracts, § 962 h; Beekham v. Drake, 2 H. L. 606; Everson v. Powers, 89 N. Y. 527; Fuchs v. Koerner, 107 N. Y. 529.

THOMAS B. PEPPER and SAMUEL B. HARE for defendant.

A servant who has been discharged before the expiration of his term, is *bound* to make a reasonable effort to secure employment, and if such is secured the money so earned must be deducted from the amount claimed for the breach. He must do whatever he reasonably can to lessen the injury.—Chamberlain v. Morgan, 68 Pa. 168; Nixon v. Myers, 141 Pa. 477; Emmens v. Elderton, 4 H. L. 645; Bishop, Contracts, § 838; Schouler's Domestic Relations, 661; Beekham v. Drake, 2 H. L. 606; Goodman v. Pocock, 15 Q. B. 583; Shannon v. Comstock, 21 Wend. (N. Y.) 461; Wood, Master and Servant, 241; Howard v. Daly, 61 N. Y. 371. If the plaintiff had made a "reasonable effort" he would have taken a position in the neighboring city, or at least resumed work at his former trade.

CHARGE OF COURT.

Gentlemen of the Jury:—

Wright, a merchant, on Dec. 27, 1894, employed Pettis, a bookkeeper, for the term of three years from Jan. 13, 1895. at the yearly salary of $700, payable in monthly installments. At the time of his employment, Pettis was 29 years old. With his father, a carpenter and builder, he had been taught carpentering, and had continued working for him until the beginning of 1894, meantime studying book-keeping. During the year 1894, he devoted all his time to receiving instruction and practice in that art. In the middle of Nov. 1895, Wright, desiring to give the place to a nephew, informed Pettis that his services would not be needed after Dec. 1st. No position of book-keeper could be found by Pettis in his town, but there were several such positions in a neighboring city fourteen miles away, three of which were vacant for a considerable part of the year 1896, and in any of which $700 per year could have been earned. Pettis could have resumed the trade of carpentry with his father and have earned $9 per week. In Jan. 1897 Pettis sued Wright for the damage for dismissing him from his employment. Pettis asks the court to instruct the jury that he should recover $758.33, the wages for the period Dec. 1st, 1895, to Jan. 1, 1897.

Wright asks an instruction to the jury that it was Pettis' duty to seek work in the neighboring city, that the jury should assume, Pettis not showing otherwise, that in a reasonable time he, Pettis, would, if he had sought it, have obtained employment there, and further, that in no event could Pettis recover more than the difference between what, as carpenter, he could have earned, and what he would have earned under the contract with him, Wright.

Pettis' term of employment, beginning Jan. 12, 1895, was to end on Jan. 12, 1898. Without cause, he was dismissed on Nov. 12, 1895. In this action, begun in January 1897, he claims $758.33, the wages for thirteen months, ending with Dec. 12, 1896.

No justification for the dismissal of Pettis is pretended by Wright. The damages which the former has suffered are therefore *prima facie*, the contractual wages for the whole term down to the time of bringing the action.—Emery v. Steckel, 126 Pa. 171; King v. Steiren, 44 Pa. 99; Fercira v. Sayres, 5. W. & S. 210; Costigan v. Mohawk & Hudson R. R. Co., 2 Denio, 609. This is true whether, as in the above cases, the term of employment was a year or less, or whether it is longer. Beckham v. Drake, 2 H. of L. 606; Emmons v. Elderton, 4 H. of L. 645.

The defendant insists, however, that from these wages must be subtracted, (a) what he could have earned as book-keeper in the neighboring city, or (b) what he could have earned as carpenter at home.

The burden of showing that by reasonable effort, Pettis would have found employment in the city is on the defendant. Emery v. Steckel, 126 Pa. 171; King v. Steiren, 44 Pa. 99; Costigan v. Mohawk etc. R. R. Co., 2 Denio 609; Howard v. Daly, 61 N. Y. 362. Has he shown this? He has made it clear that there were three positions open in the city. But it does not appear that Pettis would have been employed, had he applied. Nor has it been shown that a reasonable effort *would* have made the existence of these vacant places known to Pettis or if at all, when? How Wright learned of them, and when, we know not. If Pettis was under an obligation to visit other boroughs and cities, how many? In what order? Was he bound to include this neighboring city in his search? Must he have visited it at the commencement of his quest? Had he visited it, would he have learned of these vacant book-keeperships? We do not think it has been made plain that by reasonable effort, he would have discovered them. What Wright has done falls far short of showing as King v. Steiren, 44 Pa. 99 requires, that "employment was offered to him (Pettis) and rejected." *Cf.* Gillis v. Space, 63 Barb. 177.

But, was he under obligation, in order to mitigate the damages for which the defendant by his breach of contract made himself *prima facie* liable, to go to this neighboring city? He is bound to seek work only "in the same neighborhood." Emery v. Steckel, 126 Pa. 171. He cannot be required "to leave his home and place of residence." Costigan v. Mohawk, etc. R. R. Co. 2 Denio, 609. What means of communication exist between Pettis' place of residence and the city, does not appear. If there is no steam or electric railroad, we are unable to say that this city is in the "same neighborhood" as the borough. The duty was on Wright to disclose the facts that would justify the allegation of sufficient proximity.

Wright insists that it was the duty of Pettis to return to carpentry, by doing which he would have earned $9 per week. Pettis doubtless could not refuse any employment because it was not *precisely* like that of which Wright had deprived him. He is nevertheless bound only to accept work "of the *same* or a *similar* character," Emery v. Steckel, 126 Pa. 171; or "other like employment." Gillis v. Space, 63 Barb. 177. One improperly discharged from the superintendency of a railroad is not obliged to "take up the business of a farmer or a merchant." Costigan v. Mohawk, etc., R. R. Co. 2 Denio, 609. In Gillis v. Space, *supra*, it is intimated that a talented woman teacher, improperly dismissed from a winter school, would not be obliged to accept employment in a summer school, such school being "entirely primary," for the purpose of diminishing the damages of a party violating his contract. The employe is not compelled to continue in the employer's service at a reduced compensation, in order to relieve the latter from a part of his liability.—14 Am. & Eng. Encyc. Law, 796. Pettis had been a carpenter. But discarding that business he had at considerable expense acquired a more remunerative one, that of book-keeper. Wright cannot insist that he relapse to the less noble and compensatory business, in order to partially discharge him from a self-imposed liability. It has been faintly urged that Pettis cannot recover because he did not offer to continue his work. This was unnecessary. He was in the *midst* of his performance of it, when he was informed that his services would be no longer required. He was not bound to perform the idle ceremony of asserting his *willingness* to continue to discharge his duties. We are therefore, gentlemen of the jury, compelled to deny the requests of the defendant. Conformably with the prayer of the plaintiff, we instruct you that he is entitled to a verdict for $758.33 with interest from Dec. 12, 1896.

AMOS JONES vs. SAMUEL SPRAGUE.

Revival of judgment—Constructive notice to judgment creditor—Intermediate grantees—Notice to terre-tenant required.

Ejectment.

JOHN E. SMALL and EDMUND LOCKE RYAN for the plaintiff.

The plaintiff is not affected by the recording of subsequent conveyances by grantees not connected with the record of original title.—Patch v. Anstant, 4 W. & S. 307; Leightner v. Mooney, 10 Watts 407; Keller v. Metz, 5 S. & R. 246; Smith v. Eline, 18 Pa. C. C. 560; Owner v. Myers, 28 Pa. 134; Murphy v. Nathans, 46 Pa. 508. Fulton's Estate, 51 Pa. 204.

WILLIS E. MACKEY and THOMAS K. LEIDY for the defendant.

Act of 1849 alters prior laws to the extent that revival of a judgment against the original debtor will not bind the terre-tenant when his deed is on record or he is in actual possession of the land, and his right to notice begins with the date of such record or time of such possession.—Act Apr. 16, 1849, 1 P. & L., 2478; Porter v. Hitchcock, 98 Pa. 635; Buck's Appeal, 100 Pa. 109; Wetmore v. Wetmore, 155 Pa. 507.

To revive lien of a judgment against a terre-tenant whose deed for the land has been recorded, there must be an agreement in writing signed by said terre-tenant and entered upon the proper lien docket.—Act June 1, 1887, 1 P. & L. 2474.

Even if defendant had not put his deed on record, plaintiff is bound to give him notice.—Armstrong's Appeal, 5 W. & S. 352.

CHARGE OF THE COURT.

Gentlemen of the Jury:—

Amos Jones recovered a judgment for $493.27 against Elias Donohue on August 11, 1890. At that time Dohohue owned several houses and lots, one of which was No. 37 Wellington St., in the borough of St. Mary's. Shortly after April 1, 1891, Samuel Sprague, a real estate agent, acting for Donohue, made a lease of this house for five years to Henry Jacobs who took immediate possession. Six months afterwards, Donohue ceased to employ Sprague. On December 23, 1892, Donohue conveyed the house and lot to Moses Mendelsohn and his heirs. Mendelsohn, exactly one year afterwards, conveyed the premises to Samuel Sprague and his heirs. On July 17, 1895, an amicable agreement between Amos Jones and Elias Donohue for the revival of the judgment was filed in the prothonotary's office. Five days before this Samuel Sprague left with the recorder of deeds for record his deed from Moses Mendelsohn. That from Donohue to Mendelsohn has never been recorded. Jones, at the time of reviving the judgment, had no knowledge of the conveyance to Mendelsohn and to Sprague, but on July 29, 1895, he learned of that to Mendelsohn. Henry Jacobs remained in possession of the premises until the expiration of his term as tenant, but attorned to Mendelsohn and then to Sprague, paying them the installments of rent falling due after the commencement of their respective ownerships. On March 17, 1896, a sheriff's sale took place of the Sprague lot on a *fi. fa.* and *vend. ex.* issued on the judgment of revival of July 17, 1895, and Jones became the purchaser. In this ejectment, he seeks to recover the possession from Sprague.

When the judgment for $439.27 was recovered on August 11, 1890, it became a lien on No. 37 Wellington St., in St. Mary's borough. The sheriff's sale of those premises, took place on March 17, 1896, more than six years and seven months afterwards. Meantime, they had been conveyed by Donohue to Mendelsohn, and by Mendelsohn to Sprague. As the lien of the original judgment, expired on the 11th August, 1895, the validity of the sheriff's sale depends on the effectualness of the revival of it. Let us observe how this revival was attempted.

An amicable agreement for revival was filed in the prothonotary's office. The parties to this agreement were Amos Jones, the plaintiff in the judgment, and Elias Donohue the defendant. Had the house and lot still been Donohue's, the lien of the judgment thereon, would have been prolonged for five years from that date. But, two and a half years before they had been conveyed to Mendelsohn, and one and a half years before Mendelsohn had conveyed them to Sprague. Prior to the Act of April 16, 1849, 1 P. & L. 2478, the amicable *scire facias* to which the terre-tenant Sprague was not a party, would not have revived the lien, as to him. Armstrong's Appeal, 5 W. & S. 352; 1 Liens, 253.

The Act of 1849, and June 1, 1887, 1 P. & L. 2474, have in some respects diminished the immunity of the terre-tenant. A revival, to which the original defendant only is a party, will be effectual, even against the terre-tenant, unless he had given notice of his ownership either by having put his deed on record, or by having possession. 3 Liens, 311, 312.

Did the facts exist in this case which ex-

empted Sprague from the operation of the attempted revival? The Act of 1887, declares that "no proceeding shall be available to continue the lien of said judgment against a terre-tenant, whose deed for the land bound by said judgment has been recorded, except by agreement in writing signed by said terre-tenant, and entered on the proper lien docket, or the terre-tenant, or terre-tenants be named as such in the original *scire facias.*" If the deed is not on record, and the terre-tenant has no possession, the revival by agreement of the defendant, will be valid against his grantee. Act of Apr. 10, 1849, *supra.* If the deed is on record, the grantee must be a party to the agreement. Was then, the deed of Sprague on record?

Mendelsohn's deed to Sprague was put on record five days before the amicable revival, for, leaving for record is equivalent to recording. 1 Liens, 133, 129, 3 Liens, 152. But, Donohue's deed to Mendelsohn was never recorded. The question that confronts us then is, is the recording by the last of a series of grantees, of the deed to him from his grantor, the prior deeds which connect him with the defendant in the judgment not being recorded, sufficient to compel the plaintiff to know that he is the terre-tenant, and to join him as a party to the amicable *scire facias?*

The manifest object of the Act of 1849, and of 1887, is to furnish to the plaintiff the means of learning of any devolutions of ownership, and, if there be such, upon whom it has devolved. This object could not be accomplished if the conveyance from the defendant in the judgment were omitted from the record. It has been often decided that if A has conveyed land to B, and B has conveyed it to C, the recording of B's deed to C, that from A to B not being recorded, is not notice to X who, in ignorance of the conveyance to B, accepts another conveyance from A. Keller v. Metz, 5 S. & R. 246; Lightner v. Mooney, 10 W. 407; Tiedeman, Real Prop., 805. Jones had no more reason to suspect that Mendelsohn or Sprague had been grantees of the premises that than any other inhabitant of the United States had been. There was nothing to guide him in his searches of the records. He knew his defendant, and was bound to consult the indexes for his name in order to discover whether he had granted away the land in dispute. To compel him to know what in the records could not be thus found, would be practically to compel him to examine every recorded deed. We cannot but conclude, with the court of Common Pleas of Adams county, that the record of Sprague's deed alone, did not compel Jones to make him a party to the *scire facias.* Smith v. Eline, 18 Pa. C. C. 560.

Twelve days after the amicable revival, Jones got actual notice of the deed to Mendelsohn. The record could then have shown him the deed from Mendelsohn to Sprague. There were still thirteen days to run, before the five years of the lien of the original judgment would expire, and it is contended that Jones should in these thirteen days have made Sprague by amicable or adverse *scire facias* a party to a new revival. We think this unnecessary.

The revival being valid when made, continues valid for five years. It is not avoided by the subsequent disclosure on the record of the ownership of the terre-tenant. Besides, actual notice of the deed can have no legal consequences. Wetmore v. Wetmore, 155 Pa. 501.

We are next to ascertain whether in default of the record of the deed, there was other constructive notice of it. Under the Act of April 16, 1849, the terre-tenant's possession of the premises was equivalent to the recording of his deed. It was constructive notice, and compelled the judgment creditor to make him a party to the revival. Buck's Appeal, 100 Pa. 109; Wetmore v. Wetmore, 155 Pa. 507. Was there such possession here? The possession may be by the terre-tenant in person or by his tenant. 155 Pa. 507. Jacobs, lessee of Donohue, took possession in virtue of his lease for five years. He continued this possession during the ownership of Mendelsohn and during that of Sprague down to the time of the revival. He attorned to both Mendelsohn and to Sprague. Sprague then was through him, in possession. The mere fact that he had possession under Donohue does not make his any the less the possession of Sprague, nor make it the less monitory to Jones of the ownership of Sprague. *Cf.* Wetmore v. Wetmore, 155 Pa. 507, where the possession by the wife after she had acquired

her husband's title to the land was regarded as notice to the judgment creditor of her title, although she had been in a similar possession, while the land was her husband's. As then Sprague was in possession by his tenant when the amicable *scire facias* was filed, the Act of April 16, 1849, does not apply. (See *proviso.*) The Act of June 1, 1887, does not change the law as it was under the Act of 1827, except when the terre-tenant's deed is on record. Under the Act of 1827, as we have seen, an amicable *scire facias* to which a terre-tenant was not a party would not revive the judgment as to him. The lien of Jones' judgment had therefore expired when the sheriff's sale of Sprague's lot took place. It could not divest his right. The verdict of the jury must therefore be for the defendant.

JOHANNA FOGLER vs. PENNA. R. R. CO.

Widows' right to sue for damages for injuries to her husband—"Widow" defined —Measure of damages.

Motion for a new trial.

JACKSON ORLANDO HAAS and CHARLES E. HORN for defendant.

The Act of Apr. 25, 1855, does not apply because plaintiff suffered no pecuniary loss for want of support. No mental *solatium* can be allowed.—North Penna. R. R. Co. v. Robinson, 44 Pa. 175; Mansfield Coal Co. v. McEmery, 91 Pa. 185.

The amount of damages is excessive.—Dunn v. Penna. R. R. Co., 20 Phila. 262; Penna. R. R. Co. v. Henderson, 51 Pa. 315; Catawissa R. R. Co. v. Armstrong, 52 Pa. 282; Del. R. R. Co. v. Jones, 128 Pa. 308.

ROBERT STUCKER and J. AUSTIN SULLIVAN for the plaintiff.

Under Act April 15, 1851, the plaintiff as widow of John Fogler, has a right of action—Act April 15, 1851, 2 P. & L. 3233; Moe v. Smiley, 125 Pa. 136; P. R. R. v. Adams, 55 Pa. 499; P. R. R. v. Henderson, 51 Pa. 323; P. R. R. v. Zerbe, 33 Pa. 328; Fink v. Garman, 40 Pa. 97; Birch v. P. C. & S. R. R., 165 Pa. 339; Catawissa R. R. Co. v. Armstrong, 52 Pa. 282.

The amount of damages is not excessive —Gross v. Traction Co., 18 Pa. C. C. 29; Del. R. R. Co. v. Jones, 128 Pa. 308.

OPINION OF THE COURT.

John Fogler, 69 years of age, in good health and with a reasonable expectancy of several years, while crossing the tracks of the Pa. R. R. Co. in a milk-wagon, using proper care and caution, was, by the negligence of the R. R. Co. run into by a train and thrown violently from his vehicle to the ground. Suffering serious injuries, he lingered for seven weeks, and then succumbed to them. Before the accident, he had engaged to marry Johanna Hendricks, and, three days before his death, and in expectation of it, the marriage ceremony was performed. He had property not exceeding in value $425, besides his right of action against the defendant for damages. Within one week after his death, Johanna Fogler instituted this action. The court declined, at the request of the defendant to instruct the jury that the plaintiff had shown no cause of action. The verdict was for $2750 for the plaintiff. We are now asked to award a new trial.

The right to damages for death grows out of the act of April 15, 1851; 2 P. & L. 3233, which enacts that "whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured in his or her life, the widow of any such deceased * * * may maintain an action for and recover damages for the death thus occasioned." The act of April 26, 1855, 2 P. & L. 3234, does not affect the right of the widow in this case, and may be ignored. At common law no action could be sustained for damages arising from death.—Moe v. Smiley, 125 Pa. 136.

Do the conditions on which Johanna Fogler may maintain this suit exist? There has (1) been a death occasioned by negligence; (2) no action has been brought by the deceased in his lifetime. The third condition presented by the act is that the plaintiff shall be the widow. A widow is "a woman who has lost her husband by death."—29 Am. & Eng. Encyc. Law 119; Com. v. Powell, 51 Pa. 440. Whether a wife surviving her husband shall be a widow, does not depend upon the length of the coverture, or upon the circumstances which led to or accompanied the marriage. Mrs. Hendricks was engaged to John Fogler before the accident. The marriage three days before his death was in execution of the previous contract to marry.

Whether it would or would not have happened, had Fogler been destitute of property, it would be idle to speculate. The motives for particular marriages may be numerous. It is not the office of the courts to analyze them, or to pass sentence on their worthiness. The marital relation is established by the marriage, under whatever inducement it was undergone. Mrs. Fogler is the widow of John Fogler. Gross v. Electric Traction Company, 18 Pa. C. C. 29.

"The widow, says the Act of 1851, may maintain an action." To be a "widow" is the only qualification which the plaintiff must have. No minimum duration of the coverture which has been ended by the death, no particular age, no degree of poverty needs to have existed or to exist. The right of action being conferred by the statute, the court can not take from it, by requiring other conditions than those which the statute imposes. Absence of a cause of action, therefore, is not a cause for granting a new trial to the defendant.

Are the damages excessive? There was given no express evidence of damage. The marriage, the age of Fogler, his good health and life expectancy, his death by reason of the accident, were proven by the plaintiff. It was not necessary to show that he possessed any "specially or exceptionally good qualities, as with propriety she might have done, if the subject of her loss had been a horse or other animal." The jury might, without evidence, infer that he was an "ordinarily industrious and useful" husband, "capable of discharging properly the duties of his position." Delaware, etc., R. R. Co. v. Jones, 128 Pa. 308. In that case, the jury awarded $3000 to a husband for the death of a wife who was sixty-five years old.

It was suggested that the damages were excessive because of the brevity of the marital relation terminated by the death, and because it was begun after the accident and in view of the approaching death. The amount of the damage may be proportioned to the probable future continuance, but not to the past continuance, of the married state. If there had been no contract to marry before the accident, we should think the damage excessive, if indeed more than nominal damages could be recovered. In that case, Mrs. Hendricks would have acquired by the marriage, a dying man, whose pecuniary value to her would be inappreciable. But she had obtained his pledge of marriage before the accident, and as against the negligent company she had a right to receive him, as husband, sound and well. In Gross v. Electric Traction Company, 18 Pa. C. C. 29, there had been a meretricious cohabitation between Mrs. Gross and Benedict Gross for seven years. The accident befel him, that shortly afterwards resulted in his death. A few days before his death at the age of sixty-nine years the marriage took place. She was permitted by the court to recover a verdict of $3,500.

The rule for a new trial is discharged.

UNION R. & N. WORKS vs. KEYSTONE R. & N. WORKS.

Assigned estate—Distribution of assets—Right of stockholder to participate—"General Manager" not entitled to preference under Act 9 Apr., 1872, and supplements.

H. W. SAVIDGE and H. FRANKLIN KANTNER for the exceptants.

(1) Mobus, being a stockholder, can have no share of the funds for distribution until all outside creditors have been satisfied.—Hart's Appeal, 96 Pa. 374; Pardee's Appeal, 100 Pa. 408; Christian's Appeal, 102 Pa. 189.

(2) A "general manager" cannot be allowed preference over general creditors, even if he can claim with them, because his employment is not such labor as comes within the Act of 1872 and supplements, allowing a preference to labor claimants.—Pa. & Del. R. R. Co. v. Leuffer, 84 Pa. 168.

H. CLAY BEISTEL and H. H. GRISWOLD for the Auditor's report.

(1) Stockholders may sustain the double relation of creditor and shareholder and are entitled to a *pro rata* share of the assets.—Patterson v. Wyomissing Mining Co., 40 Pa. 117; Means' Appeal, 85 Pa. 75; Craig's Appeal, 92 Pa. 396; Schlandecker's Appeal, 22 W. N. C. 37.

(2) Mobus is entitled to preference under Act of 1872 and supplements.—Llewellyn's Appeal, 103 Pa. 458; Scull's Appeal, 115 Pa. 141; National Bank v. Oxford Co. 2 Pa. C. C. 360; Union v. Gracie, 7 Pa. C. C. 188.

OPINION OF THE COURT.

The Keystone R. & N. Works, a corporation, made an assignment of its property

for the benefit of its creditors to K. A. Lovell. At a subsequent sale $500 was realized. The claims against the corporation, when the assignment was made, amounted to $1300. Among them was a claim by F. E. Mobus, for wages, of $125. Mobus besides being a stockholder in the corporation had been the "general manager" of its business, having contracted with the company to receive $45 per month. Though he was not bound by his contract to do so, he in fact nearly every day performed some manual labor in the works. He insisted that he was entitled to be paid in full, in preference to other creditors. The auditor has awarded him the preference. The other creditors except (a) that Mobus, being a stockholder, should be postponed to non-stockholding creditors; (b) that he is not entitled to a preference.

(a) One who is a stockholder may likewise be a creditor of the corporation, and as such creditor, may resort to the remedies to which other creditors may resort. Being a mortgagee, he may sue upon the mortgage. Gordon v. Preston, 1 W. 385. Having a policy of insurance from the company of which he is a member, he may maintain debt upon it.—Ins. Co. v. Connor, 17 Pa. 136. But, not only may he, as against the corporation, enforce the payment of his debt. He may do this as against creditors. Thus, stockholders of a bank may deposit moneys in it. The bank assigning for creditors, they may claim upon their deposits ratably with non-shareholding depositors, and so reduce the dividends of the latter. Craig's Appeal, 92 Pa. 396. Depositors in a building association shared ratably in its assets after it had become insolvent, although some of them were not, and some of them were, stockholders.—Criswell's Appeal, 100 Pa. 488. A stockholder, mortgagee, was permitted to enforce his mortgage to the disadvantage of an outside creditor.—Gordon v. Preston, 1 W. 385. It may be said, generally, that a creditor does not, over against non-shareholding creditors, lose any of his rights because he is also a shareholder.—Thompson, Corporations, § 4459, 4460. Such creditors shared ratably with other creditors in Hopkins' Appeal, 90 Pa. 69. Wages claimants are entitled to a preference, although they are also stockholders—Nat. Bank v. Car Co., 2 Pa. C. C. 360. In Christian's Appeal, 102 Pa. 184, the treasurer, as creditor, was preferred to shareholders who claimed to be creditors for the withdrawal value of their shares in a building association. This demand grew out of their ownership of stock. For that reason they were postponed to the treasurer. In Hart's Appeal, 96 Pa. 355, the claim also was derived from a stock subscription. For work done, the claimant was to receive shares or transportation certificates. The latter would entitle him to a share of the gross earnings; the former, of the net earnings of the railroad. Because of the peculiar form of the credit, he was postponed to external creditors. Mobus is not precluded from recovering $125 because he was a stockholder.

(b) Is he entitled to a preference on the ground that his demand is founded on a labor contract?

The act of April 22nd, 1854, 2 P. & L. 4798, directs that in all assignments, the wages of miners, mechanics and laborers shall be preferred. While this act is not repealed by that of April 9th, 1872, except in so far as it is supplied by the latter act, Hall's Estate, 30 W. N. C. 88, Mobus is not a miner, mechanic or laborer. The act of 1872, and its supplement of June 3, 1887, have been fully supplied by that of May 12, 1891, 2 P. & L. 4787. The act of 1891 gives a preference to the amount of $200 to all moneys due "for labor and services rendered by a mechanic, miner, servant girl, or other servant or helper, porter, hostler, laundryman, teamster, clerk in stores or elsewhere, hand laborer, farm laborer, any other kind of laborer, printer, apprentice" and all other tradesmen hired for wages or salary. F. E. Mobus plainly does not fall under any of these categories. He is not a miner or mechanic, a clerk, a hand laborer or a farm laborer. He is not, in the ordinary sense of the word, a "laborer" of any kind. "Other tradesmen" must be interpreted by the context, *Noscitur a sociis*. The tradesmen meant are "other" than printers, apprentices, farm laborers, etc. It is impossible to label Mr. Mobus with any of these designations. It is true that he worked, he labored, with head, hands and feet. To buy material, to select workmen, to set them to their tasks, to allot them their wages, to supervise them, is, in one sense, to work, to labor. But, he who does these things is not a "laborer" or a

"tradesman." Mobus did perform some manual labor, but as he was not employed to do so, the wages he is now claiming were not for such labor. We think that the second exception to the auditor's report must be sustained and we re-commit the report to the auditor with the direction that he divide the fund ratably between Mobus and the other creditors.

ESTATE OF JOHN HENRY, DECEASED.

Auditor's distribution— When insurance money is regarded as realty.

J. AUGUSTUS SCHMIDT and CHARLES F. RALSTON for the exceptants.

The insurance money in the hands of the administrator must be regarded as realty.—Nichol's Appeal, 128 Pa. 428; Wyman v. Wyman, 26 N. Y. 253; Power v. Power, 7 Watts 212.

J. F. SCOTT and G. H. MOYER for the Auditor's distribution.

After payment of decedent's debts, balance of insurance money should be distributed as personalty.—Nichol's Appeal, 128 Pa. 428.

OPINION OF THE COURT.

John Henry took out a fire insurance policy on a mill for $10,000, for the period of five years. He died a year afterwards. A widow and three sons survived him. His personal property amounted to $4,720, his debt to $7,900. Within six months after his death, a fire totally destroyed the mill, and the loss suffered reached the sum of $17,000. The policy being payable to John Henry, or his executors, administrators, or assigns, the insurance company, electing to pay the money rather than to rebuild, as under the policy it might have done, paid $10,000 to the administrator. He filed his account in which he charged himself with the $4,720 and the $10,000, and claimed credit for expenses, commissions, etc., amounting to $800. The balance acknowledged was therefore $13,920.

Before the auditor, appointed to distribute this balance, the creditors claimed to be paid in full. The widow demanded one-third of the balance, absolutely, the sons claimed each one-third of the whole, subject to the right of the widow to have one-third of the whole invested during her life and to receive the interest annually. The auditor has awarded payment of the debts in full, to the widow one-third of the balance, and to each of the sons one-third of the remaining two-thirds of the balance. The sons except.

As the personalty and realty of a decedent are liable for his debts, it is immaterial so far as creditors are concerned whether the proceeds of the policy are to be deemed personal or real estate. They are at all events applicable to the satisfaction of creditors. Nichol's Appeal, 128 Pa. 428.

The more difficult problem is, whether after debts are paid the residue of the money realized on a policy of fire insurance is to be distributed as personalty or as realty. The importance of this problem arises, it need scarcely be remarked, from the difference between the course of descent of personalty and of realty on the death of the recent owner. Did both species of estate pass to the same persons in the same quantities of interest, it would never be necessary to classify the property as real or as personal.

Insurance is a contract, obliging one of the parties to it to pay to the other a sum of money, or to make repair or restoration of property in the happening of an injury to or destruction of it. It is a *chose in action*, and is personal property. But there are not wanting instances of personal property being so connected with land, as to receive for the *purpose of inheritance* the properties of land. Heirlooms, keys, deeds, fixtures not physically annexed, are specimens. A testator may destine a sum of money to be employed in purchasing land for X, and by such destination give it, the money, the course of descent that the land which it is appointed to purchase, would take. Should X die before the purchase is made, the fund would descend to her heir and not to her administrator. Her husband would have curtesy in it. Sweetapple v. Bindon, 2 Vern. 536; 6 Am. & Eng. Encyc. Law, 671. Such connection of money with land is ordinarily effected by wills. There is no reason for holding that it may not be otherwise accomplished. Did the contract of insurance effect such a connection?

The insurance is a contract for indemnity in case of injury to the land. None

but the owner can suffer that injury. It can hardly have been intended that there should be a divorce between the ownership of the land, by which alone, a damage to it would be an injury, and the right to receive the money. To one not suffering the loss, it would not be an indemnity. Hence, if after taking an insurance, the insured contracts to convey the premises, and if by such contract the insurance is not forfeited, the assured will, should a fire occur before the conveyance, receive the money in trust for his vendee. Farmer's Mutual Ins. Co. v. Graybill, 74 Pa. 17; Insurance Co. v. Updegraff, 21 Pa. 513; Reed v. Lukens, 44 Pa. 200; Hill v. Cumberland Valley Mutual Protection Co., 59 Pa. 474; Compare Walsh v. Packard, 165 Mass. 189.

By analogy, when an owner insures his land for a term of years, he so connects the money that may be realized upon the policy with the land, that in case of fire after his death the money will be payable to those who take his land as heirs or devisees. In contracting for insurance, he must be understood to contract for whoever, consistently with the terms of the policy, shall become the owner during its term, whether they become such by contract, by inheritance, or by devise. Although Nichol's Appeal, 128 Pa. 428, is not authority for this position, Wyman v. Wyman, 26 N. Y. 253, cited therein, is. We are convinced by its reasoning. The auditor was in error, in allowing to the widow one-third of the residue of the insurance money, after paying the debts. She should simply receive the interest annually on one-third of the fund during her life. The sons will be entitled to equal parts of this third immediately upon her death, and are now entitled to equal parts of the other two-thirds. The report is therefore recommitted to the auditor with a a direction that he amend his distribution in accordance with this opinion.

OVERSEERS OF THE POOR OF WALKER TOWNSHIP vs. OVERSEERS, ETC., OF SPRING TOWNSHIP.

Settlement of pauper—Jurisdiction of Court—Payment of tax by political party—Liability for relief of pauper.

Case stated.

JOHN HARRIS WILLIAMS and HORACE CODINGTON for plaintiff.

No settlement has been gained in Walker township and it is therefore not bound to furnish relief.—Act of June 13, 1836, § 9, 2 P. & L. 3549.

A person to acquire a settlement by payment of taxes, etc., must pay such for two full years in succession and must also "come to inhabit."—Cowanshannock Township Overseers v. Valley Township Overseers, 152 Pa. 504.

It is not enough that the tax was paid by an agent of a political party.—Lawrence Overseers v. Delaware Overseers, 148 Pa. 380; Dallas Township Poor District, v. Eaton Township Poor District, 161 Pa. 143.

A. A. WINGERT and JULIAN C. WALKER for defendant.

The Court of Common Pleas has no jurisdiction in this case.—Directors of the Poor of Chester Co. v. Malany, 64 Pa. 144; Sugarloaf v. Schuylkill, 44 Pa. 481; Delaware Township v. Greenwood, 66 Pa. 63; Overseers of Blair Co. v. Clarion Borough, 91 Pa. 431; Nippenose v. Jersey Shore, 48 Pa. 402; Renovo v. Half-Moon, 78 Pa. 301.

It does not appear that the act of June 13, 1836, § 9, P. & L. 3549, was complied with, so as to give Grooms a settlement in Spring township.

OPINION OF COURT.

Thomas Grooms was assessed and paid taxes in Spring Township in 1889, 1890 and 1891. Since 1891 and down to the fall of 1895 he moved around from one poor district and county to another gaining a residence, and being assessed for taxes, nowhere. In the fall of 1895 he moved to Walker Township, Centre county. He never paid any rent here and although he was assessed twice he never paid any tax, but before the election of Nov. 3, 1896, his county tax of 12 cents was paid by a politician in order to secure for the Republican party a vote. On the 28th day of December, 1896, he died and was buried on the 31st of December. A widow and three children survive him. The overseers of the poor of Walker township were requested to pay, and they paid $22, the funeral expenses. They were asked to pay no other bills. The widow and children of Thomas Grooms are now in need. No order for their relief has been obtained. This case stated is filed in the common pleas in order to procure the opinion of the court

as to whether Walker township or Spring township is liable for their support.

Walker township cannot compel Spring to provide for these poor persons unless Spring was the last place of settlement of Thomas Grooms. The 9th section of the act of June 13, 1836, 2 P. & L. 3549 enumerates eight classes of facts, any one of which will constitute a settlement. The only facts stated in the case, to show that Grooms was ever settled in Spring, is his paying taxes, assessed on him, in that township in 1889, 1890, 1891. The act of 1836 provides that a settlement shall be gained by "any such person," *i. e.* as shall come to inhabit in the district, "who shall be charged with and pay his proportion of any public taxes or levies for two years successively." Such charging with and payment of taxes must be accompanied by inhabitancy, otherwise they will not constitute settlement. One who resides near the line in township A. but pays taxes in the adjacent township B., will not acquire a settlement in B. Cowanshannock Township Overseers v. Valley Township Overseers, 152 Pa. 504. Conversely, residing two or three years in a township does not make a settlement, unless taxes are paid. Dallas Township Poor District v. Eaton Township Poor District, 161 Pa. 142. The case stated, therefore, does not disclose facts necessary to make Spring Township the district of Grooms' settlement.

Walker township could not compel Spring to support the family of Grooms, if they have gained a settlement in the former. Have they gained such settlement? The third fact which makes a settlement, is the *bona fide* taking a lease of any real estate of the yearly value of ten dollars, the payment of that amount of rent, and the habitation of the leased premises for one whole year. The case avers that Grooms "never paid any rent" in Walker township. Settlement by this means, therefore, was not obtained. Was it obtained by inhabitancy and payment of taxes? It does not distinctly appear that he inhabited Walker township. We incline to the opinion that as office holding must continue for "one whole year," when it is depended on to make a settlement, inhabitancy with payment of taxes must continue for two full years. It is certain that Grooms did not inhabit Walker township for two full years. He moved into it in the fall of 1895, and died on December 28, 1896, within sixteen months. Did he pay his proportion of taxes for two years successively? He was assessed in 1895 and in 1896. He paid neither of the taxes thus assessed. If from the statement we are to understand that the "politician" paid one of these taxes only, the other was never paid by anybody. Payment of the taxes for two successive years is indispensable. Grooms then, did not gain a settlement in Walker.

But if we are to understand the statement to aver that the taxes of the two years were paid by the "politician," such payment would be unavailing. The taxes must be paid by the assessed person himself or his agent, or the payment must be ratified by him, *e. g.* by repaying the person who paid them, or by giving him a security for the repayment. Laurence Township Overseers v. Delaware Township Overseers, 148 Pa. 380; Dallas Township Poor District v. Eaton Township Poor District, 161 Pa. 142. Accepting the receipt for the tax, on election day, and thereupon voting, is not a ratification. 161 Pa. 142. Grooms therefore was not at his death settled in Walker township. Walker has a right to exoneration from some other poor district. The misfortune is, that it is not made to appear that that district is Spring.

This action is brought and case stated filed in the common pleas. The controversy is between two poor districts, with respect to their liability *inter se*, for the support of the poor. We think the court of Quarter Sessions the more appropriate court to entertain jurisdiction. Walker should have sued out from the Quarter Sessions, a rule on Spring to show cause. Directors of the Poor of Chester County v. Malony, 64 Pa. 144; Sugarloaf v. Schuylkill, 44 Pa. 481; Nippenose v. Jersey Shore, 48 Pa. 402; Marion Township v. Spring Township, 50 Pa. 308; Overseers of Blair County v. Clarion Borough, 91 Pa. 431; Renovo Overseer v. Half Moon Overseers, 78 Pa. 301; Cowanshannock Township Overseers v. Valley Township Overseers, 152 Pa. 504; Dallas Township Poor District v. Eaton Township Poor District, 161 Pa. 142; North Beaver Township v. Big Beaver Township, 8 Pa. C. C. 82.

Even if the common pleas had jurisdiction of a controversy between poor districts, no judgment could be entered on this case stated. It does not contain the elements out of which a judgment can be constructed. The purpose seems to be to obtain the opinion, not the judgment, of the court. So far as appears, Walker has, as yet, expended nothing in the support of Grooms' widow and children; no order of relief imposing them in that district has been made. No order of removal to Spring has been made, without which whatever may have been expended by Walker could not be recovered from Spring. No judgment that Spring pay to Walker any definite sum of money can be entered. For this reason, the case stated is quashed. Commonwealth v. Howard, 149 Pa. 302; Smith v. Eline, 4 D. R. 490; Pittston Borough School District v. Pittston Borough, 5 Kulp. 440; Mudey v. County of Schuylkill, 2 Leg. Rec. 178; Dunn, Wood & Dunn v. Meixeil, 1 Leh. V. 168; Township of Rush v. Schuylkill County, 100 Pa. 356.

Case stated, quashed.

GEORGE EDWARD MILLS, A. M., LL. B.

Geo. Edward Mills was born in Danville, Pa., 1869. Having graduated from the high school of that borough, he attended the Danville Academy, and afterwards entered Dickinson College. While in college he took several prizes as rewards for special merit. He excelled especially in the departments of history and political economy. He graduated in '90 as salutatorian of his class. Entering the Dickinson School of Law the same year, he graduated in the class of '92. The trustees recognizing his proficiency as a student, elected him to the chair of Torts and Domestic Relations, upon graduation. He has been very successful as a teacher and has also built up a large and lucrative practice.